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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/2/07

SPONSOR Foley LAST UPDATED 2/12/07 HB 569

SHORT TITLE Oil and Gas Operator Civil Penalties SB \_\_\_\_\_

ANALYST C.Sanchez

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Court (AOC)

District Courts (DC)

Energy Minerals and Natural Resources Department (EMNRD)

### SUMMARY

#### Synopsis of Bill

House Bill 569 amends Section 7-2-31 NMSA 1978 to provide that in the case of a continuing violation of the Oil and Gas Act, each day of violation constitutes a separate offense. The bill provides further that a cumulative civil penalty against one person may exceed \$1,000 only if the penalty is levied by the district court for the county in which any defendant resides, in an action brought by the Oil Conservation Commission or the Oil Conservation Division of the Energy, Minerals and Natural Resources Department.

### FISCAL IMPLICATIONS

According to Oil Conservation Division HB 569 would increase the costs of bringing enforcement actions involving on-going violations, which are currently brought administratively before OCD hearing examiners or the OCC (and then may be appealed to district court on the administrative record). A civil lawsuit is more expensive because it requires travel to the district court where the violator resides (typically in the northwestern or southeastern part of the state) for motions and trial and formal discovery (including interrogatories and requests for production,

and depositions). Because civil trials are more difficult and time-consuming than administrative hearings, the bill would also increase the time spent in enforcement actions, taking time away from other enforcement activities and the other duties of the OCD.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

## **SIGNIFICANT ISSUES**

Section A provides that a civil suit alleging violation of the Oil and Gas Act may be brought in the district court of any county in which the violation occurred, in addition to in the district court where any defendant resides.

According to OCC, HB 569 would have the most serious impact in the enforcement of environmental statutes and rules, and the enforcement of OCD or OCC orders requiring or prohibiting some action. For example, the OCD and OCC, rather than the Environment Department, have jurisdiction over oil and gas operators in matters involving soil contamination and most matters involving water contamination. OCC rules require operators to clean up contaminated sites. Under HB 569, if an operator failed or refused to clean up a site, the OCD and OCC would be able to impose only a \$1,000 penalty administratively. To impose a larger penalty based on the continued refusal to clean up the site would require a district court action. Similarly, if the OCD or OCC issued an order requiring an operator to stop producing from a well for which the operator had not obtained approval to drill, and the operator continued to produce in violation of the order, the OCD or OCC would be able to impose only a \$1,000 penalty administratively. Only the courts would have the power to assess a larger penalty based on the continuing violation.

Replacing an administrative proceeding before OCD hearing examiners or OCC commissioners with a civil trial in district court is time consuming, expensive, and fails to take advantage of agency expertise and processes.

- Increased costs and time: Lawyers and witnesses will need to travel to the district court in which the violator resides for motion hearings and trial. Formal discovery will replace the informal discovery used in administrative hearings, requiring interrogatories and requests for production and depositions. Trials can take years; administrative proceedings typically take several months from filing to order.
- Increased procedural burden: Civil lawsuits require approval of the attorney general, so the OCD and OCC will no longer control enforcement of the Oil and Gas Act and the rules adopted pursuant to that act. Civil trials require strict adherence to the rules of civil procedure and the rules of evidence, which are relaxed in administrative proceedings.
- Loss of agency expertise: The Oil and Gas Act sets its own administrative process for hearing cases in front of hearing examiners and commissioners, who are required by statute and rule to have expertise in oil and gas matters. See NMSA 1978, Section 70-2-5, and 19.15.14.1217 NMAC. HB 569 would take serious enforcement matters away from examiners and commissioners knowledgeable in oil and gas matters and put them in front of the district court.

If it is impractical for the OCD and OCC to use penalties as an enforcement tool, it is more likely that they will use easier but harsher enforcement tools. The Oil and Gas Act currently provides,

“If any of the requirements of the Oil and Gas Act or the rules promulgated pursuant to that act have not been complied with, the oil conservation division, after notice and hearing, may order any well plugged and abandoned by the operator or surety or both in accordance with division rules. If the order is not complied with in the time period set out in the order, the financial assurance shall be forfeited.”

NMSA 1978, Section 70-2-14(B). It will be easier and faster for the OCD and the OCC to order an operator to plug its wells in an administrative action than to seek penalties in a civil lawsuit.

The OCD and the OCC need a workable enforcement tool short of requiring an operator to plug its wells. The OCD suggests that rather than prohibit administrative assessment of cumulative penalties, the legislature could place a reasonable cap on the administrative assessment of cumulative penalties. See proposed amendment, below.

### PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

Actions resulting from violations of the Oil and Gas Act may be further spread throughout the State’s district courts.

### ADMINISTRATIVE IMPLICATIONS

With the Oil and Gas Act’s penalty limit of \$1,000 per day (unchanged since 1935), the OCD and OCC already labor under the most restrictive enforcement provisions of any comparable state agency:

Act	Administrative Assessment	Amount	Cite
Mining Act	Yes	Up to \$10,000/day	§69-36-17
Water Quality Act	Yes	Up to \$15,000/day	§74-6-10(C)(1)
		Up to \$10,000/day	§74-6-10(C)(2)
		Up to \$25,000/day	§74-6-10(F)(1)
Hazardous Waste Act	Yes	Up to \$10,000/day	§74-4-10(B)
		Up to \$25,000/day	§74-4-10(C)(1)

Oil and gas regulatory agencies in nearby states also may issue much larger administrative assessments than OCD for continuing violations:

State	Administrative Assessment	Amount	Cite
Texas	Yes	Up to \$10,000/day	Tex.Res.Code Ann.Tit.3 §81.0531
Wyoming	Yes	Up to \$5,000/day	Wyo.Stat. §30-5119

### TECHNICAL ISSUES

Under the existing statute, NMSA 1978, Section 70-2-31(D), a person who “knowingly and willfully procures, counsels, aides and or abets the commission of any act” subject to civil or criminal penalties will be subject to the same penalties as the person committing the act. The bill amends the provision (now Section 70-2-31(E)) so that aiders and abettors are only subject to penalties for single civil offenses (not on-going civil offenses), and any criminal offense.

### ALTERNATIVES

Amend HB 569, new paragraph B at lines 14-23 on page 2 as follows:

B. For purposes of Subsection A of this section, in the case of a continuing violation, each day of violation shall constitute a separate offense, except that a cumulative civil penalty against one person may exceed ~~one thousand dollars (\$1,000)~~ five hundred thousand dollars (\$500,000) only if the penalty is levied by the district court for the county in which the defendant resides, or in which any defendant resides if there is more than one defendant, in an action brought by the commission or the oil conservation division of the energy, minerals and natural resources department.

Amend HB 569, new paragraph E at lines 5-9 on page 4 as follows:

E. Any person, who knowingly and willfully procures, counsels, aids or abets the commission of any act described in Subsection A, B or C of this section shall be subject to the same penalties as are prescribed [~~therein~~] in those subsections.”

### WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The OCD and OCC will enforce the Oil and Gas Act and rules adopted pursuant to that act under the current penalty provisions.

### POSSIBLE QUESTIONS

How will this bill benefit the citizens of New Mexico?

CS/mt